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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

EDWARD P. STRANG, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Edward P. Strang, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming his conviction in the United States District Court for the Eastern District of Michigan, Southern Division, for conspiracy to defraud the United States and to violate 18 U.S.C. § 1001 and for substantive violations of 18 U.S.C. § 1001.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit, not yet officially reported, is printed in Appendix A to this petition (*infra* at 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 30, 1968. A timely petition for rehearing en banc was denied on February 5, 1969. By order of February 26, 1969, Mr. Justice Potter Stewart extended the time for filing this petition to and including March 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a suspect may be required to testify before the grand jury considering the crime and, if so, whether he may be so required when the prosecutor: (a) refuses his request that retained counsel be present with him during his testimony; (b) does not advise him that he may consult with counsel before testifying and may have counsel available outside the grand jury room while he testifies; and (c) although aware that the suspect is represented by counsel, does not inform that counsel that his client has been subpoenaed before the grand jury.

2. Whether, when the evidence is susceptible of a conclusion that there were two conspiracies, the trial court denies a fair trial by refusing to submit to the jury the question whether the proof established two separate conspiracies, with one of which the accused was not connected, rather than the single conspiracy alleged in the indictment.

3. Whether, in a case where guilt or innocence depends upon the meaning of administrative regulations, a trial court may refuse to interpret those regulations, and, instead, submit the legal interpretation to the jury as a question of fact.

STATEMENT OF THE CASE

The petitioner, Edward P. Strang, Jr., named in thirteen counts of a thirty-three count indictment, was convicted on all the counts in which he was named. Among his co-defendants were: (1) Franklin Mortgage Corporation; (2) Benjamin Levinson, president of Franklin; (3) Ross Howard, executive assistant to Levinson; and (4) Rem Realty Company. Petitioner was president of Wayne National Life Insurance Company.

One of the counts on which petitioner was convicted alleged that, together with his co-defendants and one Robert Cerwin, an assistant to Levinson, he conspired to defraud the Veterans Administration (hereinafter V.A.) of its right to have its loan guaranty program administered pursuant to the provisions of 38 U.S.C. § 1801 *et seq.*, and the rules and regulations promulgated thereunder, and to violate 18 U.S.C. § 1001.[1] The remaining twelve counts upon which petitioner was convicted all alleged substantive violations of 18 U.S.C. § 1001, by submission of false statements to the V.A. On May 17, 1967, petitioner was sentenced to imprisonment for a term of eighteen months.

Petitioner's Appearance Before the Grand Jury

On October 20, 1964, a deputy United States Marshal attempted to serve a subpoena requiring petitioner to testify before a federal grand jury two days later. Petitioner's secretary informed the marshal that Peti-

[1] Petitioner contended in both courts below that this count failed to state an offense, relying largely upon this Court's decision in *Russell v. United States*, 369 U.S. 749 (1962). We note that the point is involved in this case, and is one which this Court may wish to consider.

tioner was out of town, read the subpoena and later that day informed him of its contents. The subpoena did not indicate the nature of the investigation. (247a-51a)[2]

On the morning of October 22, an Assistant United States Attorney telephoned petitioner at his home, told him that the grand jury was awaiting his appearance, asked him why he was not present at the Federal Building, and requested him to come there immediately. Although aware that petitioner was represented by counsel, the prosecutor had not informed counsel of the imminent grand jury appearance, but instead dealt directly with petitioner. Shortly thereafter, petitioner arrived at the Federal Building, where he was served with a subpoena requiring him to testify before the grand jury. (255a-61a; 1912a).

Before testifying, petitioner asked the prosecutor whether he could have his attorney present with him in the grand jury room. The prosecutor told him that he could not, but failed to advise him that he could consult counsel before testifying and could have counsel available outside the grand jury room for consultation purposes. Petitioner was informed, however, that he did not "have to testify to anything which would incriminate him," and was allowed to make a telephone call.

The Evidence at Trial

For purposes of this petition, the evidence may be summarized as follows:

In 1962, the Veterans Administration operated a loan guaranty program pursuant to 38 U.S.C. § 1801

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[2] All parenthetical references herein are to the Joint Appendix, filed with this Court.

et seq. and various regulations promulgated thereunder. Under this program, a veteran who met certain credit standards could obtain a loan which the V.A. would guarantee. The manner in which the loan would be guaranteed depended upon the status of the lender. A "nonsupervised" lender (an institution not subject by law to state or federal regulation) could have its loan to the veteran guaranteed only on a "prior approval" basis—i.e., matters such as the veteran's credit would be investigated by the V.A. before the guaranty was issued. On the other hand, "supervised" lenders could have their loans automatically guaranteed by the V.A. For these purposes, the Wayne Co., run by petitioner, was a "supervised" lender capable of obtaining loan guaranties on the "automatic" basis, whereas the Franklin Co., run by Levinson, was a "nonsupervised" lender.

In 1961 and 1962, Rem Realty Company sold houses to veterans (851a). Many of the veterans were poor credit risks, unable to obtain a home loan unless that loan were guaranteed. Accordingly, to induce the V.A. to guarantee loans, Rem salesmen were instructed by their superiors to falsify the veterans' credit status.

Additionally, officials of Rem forged the signatures of numerous veterans on various documents to be submitted to the lender and to the V.A. (909a-12a). By mid-December 1962, some of these cases had been sent to various companies for processing in the hope of obtaining a V.A. guaranty, while others remained dormant in the Rem offices.

Franklin was a large mortgage company dealing almost exclusively in government-insured mortgages. As a "nonsupervised" lender, it was required to deal

with the V.A. on the "prior approval" basis. Its dealings, however, had been far from satisfactory to that agency, which had requested Franklin to weed out obviously bad credit risks before submitting loan applications.

Franklin had also entered into arrangements with various "supervised" lenders, whereby it would process loan applications and submit them to the lender for acceptance or rejection. If the loan were accepted, the "supervised" lender would submit it to the V.A. for automatic guaranty and would then assign the mortgage back to Franklin. Such arrangements were proving unsatisfactory to Franklin, for some lenders were rejecting loans on the ground that the borrowers were bad credit risks. By December 1962, Franklin desperately needed new "automatic" sources. Accordingly, Levinson told his assistant Ross Howard to seek such new sources, and Howard thereupon contacted petitioner at Wayne.

Wayne was a small life insurance company with about five employees, including petitioner, its president. In mid-December 1962, Howard introduced petitioner to Levinson, and a meeting took place at the Franklin offices, attended by Levinson, Howard, petitioner and one Robert Cerwin, Levinson's assistant, who was to become the Government's chief witness at the trial. Petitioner was unfamiliar with the V.A. loan guaranty program, so Cerwin explained it to him (720a-27a).

Petitioner was then presented with the proposal that Franklin would originate, process and do a credit check on approximately $200,000 in loans to be made by Wayne. Wayne would then submit the loans to

the V.A. for automatic guaranty. After the guaranty was issued, Franklin would take an assignment of the loans. Wayne's sole task would be to put up the money; it could rely on Franklin for everything else. Cerwin explained to petitioner the "accommodation arangements" which Franklin had entered into with other supervised lenders, and stressed the mutual benefits which would flow from such an arrangement between Franklin and Wayne. Petitioner agreed. Despite what he had been told, however, he had not entered into an accommodation arrangement precisely the same as those which Franklin had made with other supervised lenders, for in every other such arrangement, the supervised lender exercised its own judgment as to whether the proposed loan was a proper one, and did not merely rely on Franklin's judgment.

Having made this arrangement with petitioner, Levinson began to gather loans to submit to Wayne. Not having enough to meet his commitment of $200,000, he contacted Rem officials and asked them to bring to Franklin whatever loans they had, even those involving poor credit risks, for he had found, he stated, a supervised lender who would take anything (586a-88a). Franklin thus obtained twelve to fifteen loan cases, many of which involved credit information which had been falsified by Rem salesmen. Cerwin warned Levinson that the credit status of some of the veterans was so bad that he would be "looking for trouble" if he were to submit them to the V.A. Levinson gave orders to process them anyway, and Cerwin did so.

A number of the loan applications which Wayne submitted to the V.A., after receiving them from Frank-

lin, contained not only false statements but also forgeries of the signatures of the veterans and of the petitioner. Petitioner, however, was never informed of the false statements, never authorized anyone to sign his name to the various loan documents, and was not even informed that the veterans whose loans he was submitting to the V.A. for automatic guaranty were poor credit risks (736a-37a; 772a-73a). Pursuant to the agreement, he relied upon Franklin to evaluate the veterans' credit.

The V.A. Regulations and Petitioner's Defense

It was the Government's theory that petitioner, his co-defendants and certain others had entered into a single conspiracy: (1) to defraud the V.A., by means of the "accommodation arrangement," of its right to have its loan guaranty program administered according to the terms of the appropriate statute and the rules and regulations promulgated thereunder, and (2) to submit to the V.A. false statements in the loan applications and other required documents. Petitioner's defense was based upon the propositions that: (1) the "accommodation arrangement" he had entered into with Levinson was not only not forbidden by V.A. regulations, but was actually authorized by them; (2) he had no knowledge that the documents that had been submitted to the V.A. contained false statements.

Petitioner's defense with respect to the accommodation arrangement pointed to a V.A. general information letter dated June 19, 1963—issued after all the loan applications involved in this case had been submitted to the V.A. This letter described the type of arrangement into which Wayne and Franklin had en-

tered and had stated that it would *no longer* be permitted. That letter is reproduced as Appendix B (*infra* at 32a). According to a V.A. official who testified for the Government, this letter announced a definite change in V.A. policy and regulations (430a, 499a).

Petitioner contended, therefore, that the arrangement he concededly made with Levinson was, at the time that he made it, an innocent arrangement permitted by the regulations.

Petitioner's defense with respect to the false statements was that he was unaware of them. Indeed, the two chief Government witnesses had firmly supported that defense (772a-73a; 832a-35a). And the evidence showed that his co-defendants had forged his signature on most of the loan documents, thus making it unnecessary for him even to see them.

The Charge and the Jury's Deliberations

Viewing the meaning of the regulations upon which petitioner relied as a question of fact, the trial court refused, though requested, to interpret the regulations for the jury in its charge. The court also refused to give to the jury a requested charge that was essential to a proper consideration of the evidence. This requested charge, reprinted in full as Appendix C (*infra* at 33a), would have given to the jury the question whether the proof showed more than one conspiracy and, if so, would have required them to consider, as against a defendant involved in but one conspiracy, only that evidence bearing upon the conspiracy in which he was involved.

During the course of their deliberations, after they had rendered verdicts as to all defendants save Peti-

tioner and Howard, the jury made the following inquiry of the court (1793a):

> What is the procedure when we find a defendant guilty on one part of a count, but not guilty on one or two other parts (of same count)?

The prosecutor and all defense counsel understood this inquiry as referring to the conspiracy count (1793a-95a). In view of the proof against Howard, it is inconceivable that the inquiry referred to him, rather than to petitioner. Counsel for petitioner requested the court to charge that a finding of guilt as to all parts of the conspiracy count was a prerequisite to a guilty verdict on that count, specifically relying upon the principle of *Kotteakos* v. *United States,* 328 U.S. 750 (1946). The court refused the request, stating that *Kotteakos* did not having "anything to do with this lawsuit." (1921a-22a). In response to the jury's inquiry, the court merely referred to its original charge on the law of conspiracy.

On the third day of their deliberations, the jury found petitioner guilty as charged.

REASONS FOR GRANTING THE WRIT

1. This case squarely presents a number of issues dealing with the question as to how a suspect's rights under the Fifth and Sixth Amendments should be protected when he is subpoenaed to give testimony before a grand jury inquiring into the crime. Such a person is placed in a situation where his Fifth Amendment rights are in jeopardy. Under present law, the suspect has no right, as he has elsewhere, to remain silent. He must decide, at his peril, which questions are incriminating and which are not. If he answers an incrimi-

nating question, he may be held to have waived his privilege with respect to the subject matter covered by the question; if he refuses to answer a non-incriminating question, he may be guilty of contempt. And the determination of whether a question is incriminating is often a difficult one to make, for the possible application of the privilege against self-incrimination to any particular question depends upon criteria so vague "that lawyers, let alone laymen, will have difficulty in knowing when to claim it." *Rogers* v. *United States,* 340 U.S. 367, 378 (1951) (Black, J., dissenting). Each question put poses the problem anew. And the suspect must solve the legal problem, under present law, without counsel by his side. Moreover, the suspects's very demeanor, even if he does not claim his privilege, may turn the grand jurors against him in cases where they would not have voted an indictment had he not appeared before them.

In light of these grave dangers to a suspect's Fifth Amendment rights, a serious question arises as to whether a suspect should ever be forced to give testimony before the grand jury. At trial, the accused need not testify, and any comment on his failure to do so violates the Fifth Amendment. *Griffin* v. *California,* 380 U.S. 609 (1965). In the police station, the suspect need not respond to the questions of his accusers. Whether a different rule should prevail at the grand jury level, where Fifth Amendment rights are in grave jeopardy, is one of the issues raised by this petition.

It is by no means, however, the major issue, for even if it may be said that our system of criminal justice should continue to tolerate so great a peril to a suspect's Fifth Amendment rights, there are a number

of important questions involved here dealing with how those rights may be effectively safeguarded.

(a) A possible safeguard, and one specifically requested by petitioner prior to his grand jury testimony, is to permit the suspect to have counsel actually with him when he testifies before the grand jury. *Sheridan* v. *Garrison,* 273 F. Supp. 673 (E.D. La. 1967) stands for the proposition that the Constitution will permit nothing less.

The circumstances which entitle a person to the assistance of counsel have been spelled out by this Court in a long line of cases, one of the most recent being *United States* v. *Wade,* 388 U.S. 218 (1967). There, this Court stated that it had the duty "to scrutinize *any* pretrial confrontation of the accused" by law enforcement agents and to apply to it the principle of the decided cases, i.e., "to analyze whether potential substantial prejudice to defendants' rights inheres in the particular confrontation and the ability of counsel to help avoid the prejudice." 388 U.S. at 227. This thought runs throughout *Wade's* entire discussion of the meaning of the right to counsel. Thus, this Court stated that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226. The Court made the test to be applied abundantly clear by contrasting its ruling in *Schmerber* v. *California,* 384 U.S. 757 (1966) with its ruling in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). In *Schmerber,* a Sixth Amendment claim by a motorist from whom a blood sample had been extracted in the absence of counsel was rejected on the ground that "[n]o issue of counsel's ability to assist the

petitioner in respect of any rights he did possess" was presented. 384 U.S. at 766, quoted in *Wade, supra,* at 223. In *Miranda,* however, the right to the presence of counsel during police interrogation was granted to suspects because of this Court's "finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation." 388 U.S. at 226.

Noting that *Sheridan* is the only case ever to hold that a suspect has the right to have counsel present in the grand jury room, the Sixth Circuit declined to apply to grand jury proceedings the principles spelled out in *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), *Miranda* and *Wade.* In doing so, the court perpetuated an anomaly in the law concerning the right to counsel. Under the Sixth Amendment as it is now understood, the only place where a suspect may be required to "stand alone against the State" is inside a grand jury room, where his Fifth Amendment rights are at least as greatly imperiled as they are in places where no door may lawfully be shut in counsel's face. Whether that is a proper understanding of the Sixth Amendment, and a proper result in an adversary system, is one of the basic questions presented by this petition.

(b) A second possible safeguard, which is not only based upon fundamental fairness to the suspect but also in no way interferes with the function of the grand jury, is to require the prosecutor to inform the suspect that he may consult counsel before testifying and have counsel available outside the grand jury room, for purposes of consultation, while testifying. That petitioner had such a right should never have been doubted, and many federal prosecutors advise potential defendants of that right. See, e.g.: *Kitchell* v. *United States,* 354

F. 2d 715, 720 n. 9 (1st Cir.), *cert. denied,* 384 U.S. 1011 (1966); *United States* v. *Tramunti,* 343 F. 2d 548 (2d Cir. 1965), *vacated on other grounds,* 384 U.S. 886 (1966); *United States* v. *Leighton,* 265 F. Supp. 27 (S.D.N.Y. 1967). If, in order to protect a suspect's Fifth Amendment rights, the police may be required to advise him of his right to have counsel available during interrogation, why should a prosecutor, from whom one tends to expect more, be allowed to withhold similar advice from one obviously interested in knowing what his right to counsel means?[3] See *United States* v. *Fructman,* 282 F. Supp. 534, 536 (N.D. Ohio 1968).

(c) A final Sixth Amendment question is raised by the fact that the prosecutor, with full knowledge that petitioner was represented by counsel, dealt directly with petitioner, rather than through counsel. Canon 9 of the American Bar Association Canons of Professional Ethics reads, in part, as follows:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

It is clear that Canon 9 is applicable to prosecutors investigating a criminal case. See American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 640 (1957) (Decision No.

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[3] The revisers of New York's law on criminal procedure have deemed it so important that a suspect about to be questioned under waiver of immunity before the grand jury be informed of his right to consult counsel, that a failure so to advise him will result in an automatic grant of complete immunity. See Proposed New York Criminal Procedure Law § 95.50(3). (Edw. Thompson Co. 1967).

249). It is equally clear that, in bypassing counsel and in dealing directly with petitioner, the prosecutor violated the Canon. We submit that such a violation of Canon 9 in a criminal case amounts to a concomitant violation of a suspect's Sixth Amendment right to the assistance of counsel. Although this Court has previously so intimated in *Escobedo* v. *Illinois, supra* at 487 n. 7, it has not yet taken the opportunity so to hold. This case presents that opportunity.

In holding that there was "no obligation on the part of the government counsel to notify Strang's counsel that Strang was subpoenaed before the grand jury," the Sixth Circuit appears to have parted company with the District of Columbia Circuit. In *Jones* v. *United States,* 342 F. 2d 863, 871, 874 (D.C. Cir. 1964), four of the eleven sitting judges stated that:

> By failing to inform counsel of the impending examination [before the grand jury], the prosecution deprived [defendant] . . . of his assistance, at a crucial time and greatly to . . . [defendant's] prejudice; his right to counsel was violated by failure to notify his lawyer that he was to appear.

Two other judges, making a majority of the Court, agreed that the grand jury procedure there followed was improper, disagreeing only as to the sanction that should be imposed. Since there is no unified opinion in *Jones,* it is not suggested that there is a direct decisional conflict between the Sixth and the District of Columbia Circuits. However, the conflict in views between those circuits contributes to the worthiness of the point being raised here for review.[4] Even if the

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[4] See *People* v. *Arthur,* 22 N.Y. 2d 325 (1968), where the New York Court of Appeals held that once counsel is in a case, all questioning of a suspect must cease, unless the suspect waives his right to counsel *in the presence of counsel.*

prosecutor should not be required to inform a suspect of his rights, he surely should be required to observe the Canons of Professional Ethics and to notify the suspect's counsel of any proposed interrogation.

2. It was petitioner's position throughout the trial that, although the transaction alleged in the first count was a single, unified conspiracy insofar as his co-defendants were concerned, it consisted, as to him, of two separate and distinct plans, with one of which (the plan to submit false statements) he was in no way involved, and the other of which (the accommodation arrangement) was perfectly lawful, or at least considered lawful by him when he entered into it. There was ample evidence to support these contentions, e.g., the testimony of the two chief Government witnesses that petitioner did not know of the false statements being made to the V.A. by his co-defendants.

The trial court made it virtually impossible for the jury to give fair consideration to this defense. By failing to charge as petitioner requested on the question of variance, it allowed petitioner to be gravely prejudiced by evidence which may not have had any bearing upon his individual guilt or innocence. In *Kotteakos* v. *United States*, 328 U.S. 750, 769-70 (1946), this Court reversed a conviction for an alleged single conspiracy where the proof showed a number of separate conspiracies, stating that the major vice of the variance:

> was to prevent the [trial] court from giving a precautionary instruction such as would be appropriate, perhaps required, in cases where related but separate conspiracies are tried together . . ., namely that the jury should take care to consider the evidence relating to each conspiracy separately

from that relating to each other conspiracy charged.

The question here presented to the Court is not the all-too-familiar one that the proof in the case showed a variance as a matter of law, although such an argument could reasonably be made; it is, rather, that the issue whether a variance existed was not submitted to the jury. That issue involves a fact question for the jury's determination. See, e.g.: *United States* v. *Crosby,* 294 F. 2d 928, 945 (2d Cir. 1961), *cert. denied sub nom. Mittelman* v. *United States,* 368 U.S. 984 (1962) ("Whether a scheme is one conspiracy or several is primarily a jury question, since it is a question of fact as to the nature of the agreement."); *Lefco* v. *United States,* 74 F. 2d 66, 69 (3d Cir. 1934); *United States* v. *McConnell,* 285 Fed. 164, 166 (E.D. Pa. 1923). The jury's determination of that question of fact is crucial in a case such as this, for upon it is likely to hinge the verdict.

If a jury, in a case possibly involving multiple conspiracies rather than the single one charged, finds as a fact that more than one conspiracy was proved, then it may not consider as against a defendant involved in only one of the conspiracies evidence which relates solely to the other separate conspiracies. Illustrative of this important principle is *United States* v. *Lev,* 258 F. 2d 9 (2d Cir. 1958), *aff'd on other grounds,* 360 U.S. 470 (1959). There, four defendants had been convicted under a conspiracy count alleging fraud in the procurement of Government contracts. The contracts involved the sale of Army garrison hats (the "Bonita transaction") and Navy hats (the "white hat transaction"). The trial court had charged the jury that there was not one conspiracy, but two. All defendants

alleged a fatal variance. The Second Circuit stated, at page 11, that:

> Here, although from Lev's vantage point the Bonita transaction was completely separate from the white hat transaction, from the viewpoint of the other appellants the conspiracy was a single one to defraud the Government in matters of war contracts. Thus as to Rubin, Ades, and Wool, who were involved in both transactions, there is properly speaking, no variance. [Citing cases].
>
> As Lev was involved only in the latter transaction, a more serious question of variance does arise as to him.

The Second Circuit went on to find that the error as to Lev was harmless, because the trial court's instructions scrupulously protected his right to have only the evidence bearing on the transaction in which he participated considered by the jury in determining his guilt or innocence. See also: *United States* v. *Borelli,* 336 F. 2d 376, 386 n. 4 (2d Cir. 1964), *cert. denied* 379 U.S. 960 (1965); *Fernandez* v. *United States,* 329 F. 2d 899 (9th Cir.), *cert. denied,* 379 U.S. 832 (1964); *Hayes* v. *United States,* 329 F. 2d 209, 214 (8th Cir.), *cert. denied,* 377 U.S. 980 (1964); *United States* v. *Manton,* 107 F. 2d 834, 840 (2d Cir. 1938), *cert. denied,* 309 U.S. 664 (1940).

No such instructions were given in this case, and thus petitioner, whose defense was that the accommodation arrangement—the only agreement of which he had any knowledge—was lawful or at least thought by him to be lawful, was prejudiced by the jury's use against him of the numerous acts of wrongdoing committed by his co-defendants. Those acts included falsi-

fications and forgeries on V.A. loan documents, deceptions practiced upon uneducated veterans (851a-52a), false threats to put a veteran in jail if he failed to move into a house which he had purchased (1068a) and Levinson's conduct in defrauding the F.H.A. with respect to two veterans' loans which had been turned down by the V.A. To have such conduct attributed to him and used against him, even though he never agreed to it or even knew about it, fatally prejudiced his case. See, e.g., *United States* v. *Kelly,* 349 F. 2d 720 (2d Cir. 1965), *cert. denied,* 384 U.S. 947 (1966).

In dealing with the issue raised here, the Sixth Circuit stated that there was "more than sufficient evidence to support the jury's implicit finding of a single conspiracy." That statement, however, is a legal impossibility. Only if given some instruction such as petitioner had requested could the jury, implicitly or explicitly, have found there was a single conspiracy. In fact, the jury was never given the opportunity to choose between a single and multiple conspiracy. Moreover, the alleged "implicit finding" is contradicted by the record; the jury inquiry demonstrates that the jurors were actually attempting to make a finding of two separate plans, with one of which petitioner had nothing to do. The trial court nevertheless refused to allow the jury to make such a finding.

The issue presented here far transcends the guilt or innocence of this particular petitioner. The conspiracy device is a prosecutorial favorite in the federal system; countless prosecutions for conspiracy are instituted in federal courts each year. The variance issue is perhaps the most recurrent in these cases. Taking that issue away from the jury, thus laying the

accused open to the risk that there will be attributed to him evidence concerning a conspiracy in which he did not participate, so erroneously weights the balance against the accused as to make a defense, hitherto most difficult, henceforth virtually impossible. In approving such a course, the Sixth Circuit is in sharp conflict with numerous other circuits which have been called upon to decide the issue. See, e.g.: *United States* v. *Lev, supra* (2d Cir.); *United States* v. *Crosby, supra* (2d Cir.); *Lefco* v. *United States, supra* (3rd Cir.); *United States* v. *Goss,* 329 F. 2d 180 (4th Cir.); *Papalia* v. *United States,* 243 F. 2d 437 (5th Cir. 1957); *Hayes* v. *United States, supra* (8th Cir.); *Fernandez* v. *United States, supra* (9th Cir.).

3. Many federal prosecutions involve the precise meaning of governmental administrative regulations. In this case, petitioner's guilt or innocence hinged upon the precise meaning of certain V.A. regulations. The conspiracy count alleged, in part, a conspiracy to defraud the V.A. of its right to have its loan guaranty program administered in accordance with its rules and regulations. Here the case was submitted to the jury upon the Government's theory that petitioner intentionally agreed to violate V.A. regulations by delegating to Franklin the non-delegable duty of checking the credit of applicants for guaranteed loans.[5] Petitioner's theory was that those regulations specifically authorized the delegation of duty which was part of the "accommodation arrangement." The meaning

[5] This was not the theory, however, which was pleaded in the indictment or upon which the Government presented most of its case, a point which petitioner raised below in arguing that the indictment failed to state an offense. See footnote 1, *supra.*

of the regulations upon which petitioner relied was thus the crux of the case.[6]

During the pre-charge conference, the trial court noted that all the applicable regulations were contained in a document (The Lenders Handbook) which had been received in evidence and which could therefore be examined by the jury. The court further noted that there was "a difference of opinion as to what the impact of the regulations is," and stated that he therefore regarded the matter as a "question of fact." Counsel for petitioner specifically requested the court to interpret the regulations and "to advise the jury of what his construction of the law is," but the court refused to do so (1653a-54a), and gave the jury no instructions whatsoever as to the meaning of the regulations involved. The Sixth Circuit approved that course, contenting itself with observing that the regulations were before the jury, had been referred to extensively by defense counsel throughout the trial, and had been explained and interpreted from the witness stand by an official of the V.A. Having first, to petitioner's prejudice, treated a question of fact (whether there was a variance) as a question of law, the Sixth Circuit, again to petitioner's prejudice, now treated a question of law (the meaning of the regulations) as a question of fact.

In ruling as it did, the Sixth Circuit is in direct conflict with the Second Circuit. *United States* v. *Gu-*

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[6] Since absolutely no evidence was presented showing that petitioner knew of the submission of false statements to the V.A., his conviction on the substantive counts necessarily rests upon the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640 (1946), which was charged to the jury. Thus, guilt on all counts depended upon a finding that, when agreeing to the accommodation arrangement, petitioner knew he was violating V. A. regulations.

terma, 281 F. 2d 742, 751-52 (2d Cir. 1960) (conviction reversed because "the judge gave the jury a task properly his own, namely, the interpretation of the term 'net book value' in SEC Instruction 4 as applied to a pledge of securities"). The importance of this issue is underscored by the constant and boundless proliferation of federal administrative regulations, any one of which may and often does become a crucial issue in a criminal prosecution. This Court should not view lightly the prospect that juries of laymen may have thrust upon them the function of construing these regulations, often so labyrinthine as to confound trained legal minds, and may be permitted, by their unreviewable conflicting constructions, to make the law apply differently from one case to another.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that his petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
PATRICK M. WALL
1000 Hill Building
Washington, D. C. 20006

DONALD E. SHELY
DONALD S. YOUNG
Penobscot Building
Detroit, Michigan 48226

Counsel for Petitioner